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In The

Supreme Court of the United States

October Term, 1985

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should resolve the critical dispute amongst the courts of appeals as to what standard of review should apply to determine if a state prison regulation prompted by legitimate penological objectives unconstitutionally restricts a prison inmate's free exercise of religion rights?

2. Whether the Court of Appeals for the Third Circuit erred when it adopted what amounts to a "least restrictive alternative" approach in analyzing prisoners' free exercise claims in complete disregard for this Court's analyses of other First Amendment rights in the prison context?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Edward O'Lone, James Ucci and William Fauver respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 27, 1986.

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OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey (39A-55A), denying respondents' claim for relief is reported at 595 *F. Supp.* 928 (D. N.J. 1984).

The opinion of the United States Court of Appeals for the Third Circuit (1A-38A) vacating the judgment of the district court is reported at 782 *F.*2d 416 (3d Cir. 1986).

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JURISDICTION

The case was argued before the court of appeals on June 21, 1985. The case was reargued before the court *en banc* on November 12, 1985 and was decided on January 27, 1986. The petition is being filed within 90 days of January 27, 1986.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 *U.S.C.* § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

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STATEMENT OF THE CASE

Respondents Mateen and Shabazz,[1] state prisoners housed at the New Jersey State Prison, Leesburg (hereinafter "LSP"), are practicing Muslims. Their religious beliefs require them to attend Jumu'ah, a Muslim service held on Fridays after the sun reaches it apex and before the midafternoon prayer. Such a service is held each week on Fridays at LSP inside of the main building from 12:00 noon to 1:00 p.m.

Those prisoners assigned to gang minimum status[2] are for the most part required to work on details outside

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[1]Shabazz died on January 15, 1986. Mateen was paroled on July 17, 1985.

[2]The New Jersey Department of Corrections Standard 853 (hereinafter standard 853) (59A-61A) sets forth three custody classifications to which inmates are assigned. The security status of the inmate affects the type of work to which he may be assigned: Maximum custody inmates must be assigned to work within the security perimeter under constant supervision; gang minimum inmates must be assigned to jobs which require them to move outside the security perimeter of the institution within the eyesight of a correction officer; inmates who have full minimum status must be assigned to jobs or programs outside the main institution with minimal supervision.

of the main building throughout the approximately 1100 acres of property on which the prison is situated. LSP does not "warehouse" inmates; rather, the prisoners produce goods and provide services throughout the State, thus teaching them the skills they will need to function in society.[3]

The outside work detail program was instituted at LSP in April 1983 to implement a new revision to Standard 853 which required all inmates to pass through a stage of gang minimum status prior to becoming eligible for full minimum status.[4] Since only those with full minimum status can be assigned to the LSP minimum security unit (known as the "Farm"), LSP was faced with an increase in the number of inmates who had to be housed within the main building[5] (i.e., the medium security unit). Because

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[3]LSP has both a medium and minimum security facility. The inmates assigned to LSP are not those with very lengthy sentences. Rather, they are expected to progress from maximum to gang minimum to full minimum custody status and eventually to release in free society. As the inmate progresses through each level of custody, he is given responsibilities further away from the institution and with less supervision. The program is designed to ease the transition into society and is structured to resemble the "real world". The inmates thus, are expected to work as close to a full work day as possible; i.e., once they go outside to their job assignments, they remain there until the work day is finished. When they return to the prison they can take care of personal needs on their own time.

[4]The idea was to reduce the number of escapes of those who had been assigned to full minimum directly from maximum custody.

[5]The main unit was originally designed to hold 504 inmates but housed 704 at the time of the hearing in the district court.

of the strain on the institutional facilities and the social pressures which built up due to the overcrowding in the main building, the administrators developed the outside work detail program to move 100 to 150 gang minimum inmates out of the institution during the day. The program served two functions—relieving critical overcrowding and teaching inmates skills for living and working in free society.

Unfortunately, the administration was faced with inmate resistance to the program[6] and initially attempted to accommodate inmates' requests to make the program more palatable. However, allowing inmates to stay in or allowing them to come inside during the day became increasingly burdensome and jeopardized the security and order of the institution. Therefore on March 7, 1984, the administration issued a policy prohibiting any returns to the institution by inmates assigned to the outside work details. This was primarily done to reduce the security risks at the receiving gate (through which all inmates had to pass when going in and out of the institution) created by the large volume of traffic passing through it.[7] The new policy reduced traffic at the gate in another way as well: previously, if one of the eight to twelve inmates

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[6]Superintendent O'Lone testified that while 150 inmates might be *assigned* to work outside, some days only 60 or 70 prisoners actually cleared the gates because of the excuses they used to avoid the rigorous work.

[7]The uncontradicted record evidence was that the receiving gate is a high security risk area, traditionally the site of escapes, requiring intensive supervision. All incoming and outgoing delivery traffic passes through the gate and must be searched. Likewise, all inmates passing through must be identified, logged in and strip searched prior to being admitted into the institution.

on a gang minimum detail wanted to return to the institution, the entire detail had to be brought in since only one officer supervises each detail, and all gang minimum inmates must be under constant supervision when outside of the institution. Allowing inmates to return from the outside to attend Jumu'ah created an additional security risk. Jumu'ah takes place generally from noon to 1:00 p.m., which is the time when the noon meal is being served en masse to those prisoners who work inside of the prison. Because of the increased risk of escape during mass movements (such as the noon meal), the security gate is shut and all available officers are stationed in and around the dining hall.

The March 7, 1984 policy effectively prohibited those gang minimum Muslim inmates assigned to work outside from returning to the institution on Fridays to participate in Jumu'ah.[8]

Furthermore, those inmates who have full minimum status and who are housed at the Farm are permitted to return to the Farm for Jumu'ah if they are assigned to work either in the Farm or within close proximity thereto. Those who are working off of prison grounds, are not per-

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[8]Respondent Mateen testified that from February 1984, when he first became gang minimum until the policy went into effect on March 7, 1984, he was permitted to work on an alternate detail on Fridays which was inside the security perimeter, thus freeing him to attend Jumu'ah. This detail was changed to a maximum security detail in March 1984 because it worked inside the security of the institution (and pursuant to Standard 853 should only be comprised of maximum custody inmates) and because the arrival at LSP of more "risky" inmates (due to the opening of two new less secure correctional institutions in the State) required that the detail be comprised of only maximum custody inmates.

mitted to return. At the time the complaint was filed, respondent Mateen was a gang minimum inmate; however, at the time of the hearing in the district court, he was classified full minimum, was housed at the Farm and had a job assignment in the kitchen so that he was able to attend Jumu'ah. 595 *F. Supp.* at 930. (44A). However, the district court found as fact that Mateen could be reassigned to an outside detail in the future and rejected petitioners' mootness argument. *Id.* at 930-31 (44A).

Respondents filed a civil rights complaint pursuant to 42 *U.S.C.* § 1983 in the district court alleging first amendment violations. They sought preliminary and permanent injunctions as well as compensatory and punitive damages. The Honorable John F. Gerry appointed counsel to represent respondents. Following a hearing on both the preliminary and permanent injunction requests, the district court held that the regulation in question was constitutionally valid. The court went further however, and examined all of the proposed alternatives suggested by respondents. Finding that each alternative posed security problems for the prison, the district court denied the injunctive relief and dismissed the claims for punitive and compensatory damages.

Respondents appealed the district court's decision to the United States Court of Appeals for the Third Circuit. The case was argued before a panel of that court. Thereafter, the court on its own motion set the case down for rehearing *en banc*. The court's opinion, over the dissent of Judge Hunter joined by Judge Garth, substantially modified its previous opinion on this issue in *St. Claire v. Cuyler*, 634 *F.*2d 109 (3d Cir. 1980). The majority held that its *St. Claire* decision did not embrace this Court's

requirement of "mutual accommodation" between constitutional rights and the security needs of the prison as articulated in *Wolff v. McDonnell*, 418 *U.S.* 539 (1974). The court concluded that the *St. Claire* test[9] did not provide adequate protection to the free exercise rights of inmates. Rather, the Third Circuit required the prison officials to prove that the regulations "were intended to serve and do serve" the objective of security and that "no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." 782 *F.*2d at 420 (9A).

In the dissent, Judge Hunter found that the majority opinion was not supported by Supreme Court precedent and that the majority did not give adequate deference to the testimony of the prison officials. 782 *F.*2d at 421 (12A).

REASONS FOR GRANTING THE WRIT

1. An Authoritative Decision of This Court is Necessary to Resolve the Conflict in Decisions of the Various Courts of Appeals on This Constitutional Question.

This Court has never decided what standard of review should apply in determining whether a prison regulation

[9]Under *St. Claire*, the prison officials must come forward with evidence that the religious practice would jeopardize security. That evidence may be in the form of testimony from responsible prison officials. If the court finds that the opinions of the officials are sincerely held and arguably correct, the prisoners must show that officials' response was exaggerated in order to prevail. 634 *F.*2d at 114.

or policy which limits the ability of prison inmates to freely practice their religion violates the free exercise clause of the First Amendment. This Court has however, examined other First Amendment rights in the prison context. In *Procunier v. Martinez,* 416 *U.S.* 396 (1974), this Court examined prisoner mail censorship regulations as to whether they unconstitutionally infringed on the free speech rights not only of the prisoners but also of the free citizens with whom they corresponded. Since the Court was analyzing the first amendment rights of free citizens, the standard articulated in *Procunier* was that the regulation must further an important governmental interest such as security, order or rehabilitation and the limitation must be no greater than necessary. *Id.* at 413. Shortly thereafter, this Court considered the free speech rights of inmates to meet with members of the media. *Pell v. Procunier,* 417 *U.S.* 817 (1974). The Court held that determinations made by prison officials about the security of the institution are peculiarly within their province and must be granted deference absent substantial evidence indicating that the officials exaggerated their response. *Id.* at 827. Five years later, this Court considered the free speech and associational rights of prisoners who had organized a labor union. *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 *U.S.* 119 (1977). The Court held that the burden is not upon the prison administrators to show affirmatively that the restricted activity would pose a threat to the security of the prison. *Id.* at 128. As long as the testimony of the prison officials consists of opinions about security which are sincerely held and arguably correct, the court must defer to their judgment absent a showing that these beliefs were unreasonable. *Id.*

Using these cases as a starting point the various circuits have devised at least five different standards of review of whether a prison regulation limits the free exercise rights of inmates. Moreover, several circuits have repeatedly changed or modified their own standards leading to great uncertainty for prison officials and prisoners alike.

In 1980, the Third Circuit considered a prison regulation which prohibited prisoners from wearing hats in the dining hall. *St. Claire v. Cuyler,* 634 *F.*2d 109 (3d Cir. 1980), rehearing denied 643 *F.*2d 103 (3d Cir. 1981). A Muslim prisoner was given disciplinary charges for wearing a religious hat into the dining hall. *Id.* Based upon this Court's opinions in *Jones* and *Pell,* the court held that if prison authorities come forward with evidence in the form of their own testimony that permitting the free exercise of the religious practice would potentially jeopardize legitimate penological objectives and if these opinions are sincerely held and arguably correct, the court must defer to their judgment in the absence of substantial evidence that their response was exaggerated. *Id.* at 114-115. In 1985, the Third Circuit decided two more cases involving the free exercise rights of inmates and affirmed the analysis articulated in *St. Claire. Cole v. Flick,* 758 *F.*2d 124 (3d Cir. 1985), *cert.* denied — *U.S.* —, 106 *S.Ct.* 253, 88 *L.Ed.* 2d 260 (1985); *Wilson v. Schillinger,* 761 *F.*2d 921 (3d Cir. 1985), rehearing and rehearing *en banc* denied (July 31, 1985). Less than one year later, the Third Circuit decided the present case and completely rejected its earlier case law. Instead, the court determined, for no apparent reason, that the *St. Claire* standard did not adequately protect the free exercise rights of prisoners. 782 *F.*2d at 420 (9A).

The new standard requires the state to prove that the challenged regulation serves the penological objective of security and that no reasonable method exists by which to accommodate the inmates without creating security problems. *Id.*

The Eighth Circuit has also vacillated on this issue. In 1975, that court held that the free exercise rights of inmates should be analyzed in the same manner as those of free citizens. *Teterud v. Burns* 522 *F.*2d 357 (8th Cir. 1975). Thus, a prison regulation which infringes on the free exercise rights of an inmate will be struck down if there are less restrictive alternatives available. *Id.* However, in 1982, that court rejected the "least restrictive alternative" analysis in favor of that adopted by the Third Circuit in *St. Claire. Otey v. Best*, 680 *F.*2d 1231 (8th Cir. 1982). Shortly thereafter, the Eighth Circuit distinguished the facts in *Teterud* rejecting its standard and reaffirmed the test of *St. Claire* which it adopted in *Otey. Hill v. Blackwell*, 774 *F.*2d 338 (8th Cir. 1985).

In conflict with the Third Circuit's opinion, the United States Court of Appeals for the Seventh[10] and Ninth[11]

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[10]*Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), cert. den. 464 *U.S.* 996 (1983), involved a male Muslim state prisoner who received a disciplinary charge for refusing to submit to a pat frisk by a female guard because such was contrary to his religious beliefs. The court held that the restraint on the free exercise of religion was justified as long as the regulation had an important objective (in this case not a security objective but rather the goal of providing equal employment opportunities to women) and the restraint was reasonably adapted to meet the objective. *Id.* at 960.

[11]The Ninth Circuit in *Jones v. Bradley*, 590 F.2d 294 (9th Cir. 1979), held that prison regulations which denied an inmate-pastor of the Universal Life Church the right to use the prison chapel without a chaplain or outside sponsor present were rea-

(Continued on following page)

Circuits have adopted a test of reasonableness. As long as the regulation is reasonably based upon a legitimate penological objective, there is no constitutional violation. The Fourth Circuit also adopted the reasonableness standard in *Barrett v. Commonwealth of Virginia*, 689 *F.*2d 498 (4th Cir. 1982) which followed its *en banc* decision in *Sweet v. South Carolina Department of Corrections*, 529 *F.*2d 854 (4th Cir. 1975) (*en banc*). However, in an interim decision, the same court held that a prison hair length regulation which infringed on an inmate's religious beliefs was unconstitutional since there were less restrictive alternatives available to meet the security objectives. *Gallahan v. Hollyfield*, 670 *F.*2d 1345 (4th Cir. 1982).

The Second Circuit[12] had applied a least restrictive alternative analysis but most recently analyzed this issue under the *Pell* framework and determined that if the regulation was based upon justifiable security concerns and there was no evidence in the record to show that the response of prison officials was exaggerated, no constitutional violation occurs.[13]

(Continued from previous page)

sonable to maintain security and order. However, in *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981), the court analyzed restrictions on inmates' free speech rights and held that the challenges to First Amendment rights of inmates must be analyzed in terms of legitimate penological objectives; the restriction must be no greater than necessary. *Id.* at 1355.

[12]*Burgin v. Henderson*, 536 F.2d 501 (2d Cir. 1976); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975).

[13]*Smith v. Coughlin*, 748 F.2d 783 (2d Cir. 1984).

A balancing approach has, for the most part, been adopted by the Sixth Circuit.[14] This test requires the court to balance the prisoner's constitutional rights against the state's legitimate interest in operating its prisons. Yet, in one case, the Sixth Circuit only required the prison officials to present testimony supporting their judgment that the regulation was necessary to maintain security and order.[15] Once that burden is met, the court will not substitute its judgment for that of the prison authorities.[16]

Without a uniform standard for testing the constitutionality of prison regulations which incidentally infringe upon the free exercise rights of inmates, federal courts will continue their involvement into the affairs of prison administration, prison officials will not know what is expected of them and prisoner's First Amendment rights will be subjected to ever-changing standards of review. Review by this Court is necessary to resolve this conflict.

2. The Decision of the Third Circuit is in Direct Conflict With Decisions of This Court.

This Court has never decided what standard federal courts should utilize in determining whether a prison regulation or policy impermissibly infringes on the rights of prison inmates under the first amendment's free exercise guarantee. However, the Court has in recent years, adopted a policy of deference to the expert judgment of prison

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[14]*Walker* v. *Mintzes*, 771 *F.*2d 920 (6th Cir. 1985); *Abdullah* v. *Kinnison*, 769 *F.*2d 345 (6th Cir. 1985); *Weaver* v. *Jago*, 675 *F.*2d 116 (6th Cir. 1982).

[15]*Brown* v. *Johnson*, 743 *F.*2d 408 (6th Cir. 1984), *cert.* denied, — *U.S.* —, 105 *S.Ct.* 119, 84 *L.Ed.*2d 336 (1985).

[16]*Id.* at 413.

administrators in making determinations as to how best to maintain internal security within their institutions where such determinations are challenged pursuant to the first amendment's free speech and associational guarantees (*Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 *U.S.* 119 (1977); *Bell v. Wolfish*, 441 *U.S.* 520 (1979); *Pell v. Procunier*, 417 *U.S.* 817 (1974)); the fourth amendment's guarantee of privacy (*Bell v. Wolfish, supra*); or the fourteenth amendment due process guarantees (*Hewitt v. Helms*, 459 *U.S.* 460 (1983)). In these cases, the Court did not apply the same analysis as in cases involving infringements on the fundamental rights of free citizens. Rather, this Court based its analysis upon the fact of confinement following a valid criminal conviction and the State's need for security and order in its correctional institutions.[17]

Although the Third Circuit had previously applied a standard based upon a well-reasoned extension of the

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[17]For example in *Pell* the Court was faced with a challenge to a California Department of Corrections regulation which prohibited media interviews with specific individual inmates. 417 *U.S.* at 819. The Court upheld the regulation as against the first amendment challenge based, in part, on the alternative means of communication available. The Court noted that such an analysis would not be applicable to curtailments of the first amendment rights of free citizens:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 *U.S.* 475, 492, 93 *S.Ct.* 1827, 1837, 36 *L.Ed.*2d 439 (1973). [*Id.* at 825-26].

above-cited cases to the issue of prison regulations which curtail religious activity, *St. Claire v. Cuyler, supra,*[18] the court below has now "modified" its *St. Claire* decision. In so doing, it has ignored the fact that this Court has articulated different standards applicable in the prison context, based upon the unique and difficult problems in administering prisons and maintaining security therein. The lower court has completely rejected this Court's policy of deferring to the judgment of those charged with running state prisons and has adopted a standard which requires federal judges to second guess the state officials' decisions by finding a "reasonable" means to accommodate prisoners. Not only has the Third Circuit misconstrued this Court's use of the phrase "mutual accommodation", (see argument, *infra* at 18-19), but it has erroneously articulated a standard of review heretofore reserved for analyzing infringements of fundamental rights of free citizens. That the same standard should apply in the prison setting is contrary to every analogous case decided by this Court to date.

In recognizing the difference between life in prison versus that in free society, this Court has noted that prisons are "populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance."[19]

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[18]The Court of Appeals for the Eighth Circuit specifically adopted that standard set forth in *St. Claire* finding that it was "derived from a sound reading of the decisions in" *Pell v. Procunier, supra, Jones, supra* and *Wolfish, supra. Otey v. Best, supra,* 680 F.2d at 1233.

[19]It is a matter of public record that respondent Shabazz was serving a life sentence for convictions of murder and that respondent Mateen was serving a thirty to thirty-one year sentence for convictions of kidnapping and weapons offenses at the time of the hearing before the district court.

Jones, supra, 433 *U.S.* at 129. As such, the Court has repeatedly emphasized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 *U.S.* 266, 285 (1948). See also *Jones, supra,* 433 *U.S.* at 125; *Pell, supra,* 417 *U.S.* at 822.

Indeed limitations on constitutional rights are "implicit in incarceration." *Jones, supra,* 433 *U.S.* at 125. Even where first amendment values are implicated, this Court "has repeatedly recognized the need for major restrictions on a prisoner's rights." *Id.* at 129. (Citations omitted). Prisoners do not however, lose all of their constitutional rights because of their conviction and confinement in prison. *Wolfish, supra,* 441 *U.S.* 545.

Any challenge to a prison policy which has the effect of restricting a first amendment interest "must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." *Pell, supra,* 417 *U.S.* at 822. In *Pell,* this Court identified four basic objectives of the correctional system: deterrence of crime; rehabilitation of criminals; protection of society; and maintenance of internal security. *Id.* at 822-23. This last goal of institutional security is the central goal of incarceration and is essential to the achievement of all other correctional objectives. *Id.* at 823. Thus, this Court has held "that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison ad-

ministration, safeguarding institutional security." *Wolfish, supra,* 441 *U.S.* at 547.

This Court also observed that determinations involving rehabilitation and institutional security "are particularly within the province and professional expertise of corrections officials," and cautioned federal courts to defer to prison officials' decisions in these areas unless the record indicates that officials have greatly exaggerated their response to prison conditions or that the response is irrational. *Pell, supra,* 417 *U.S.* at 827.

The requirement that federal courts grant deference to the judgment of prison officials is rooted in the fact that "[p]risons, by definition, are places of involuntary confinement of persons who have demonstrated a proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer,* 104 *S.Ct.* 3194, 3200 (1984). This court has repeatedly acknowledged that

> the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 128, *Procunier v. Martinez, supra,* at 404-405, *Cruz v. Beto, supra,* at 321, see *Meachum v. Fano,* 427 *U.S.* at 228-229.

Wolfish, supra, 441 *U.S.* at 547. Deference is also required not only "because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge," but also because of the inherent nature of the judicial branch as being separate from the legislative and executive branches

that administer state prisons. *Id.* at 548. By requiring the reviewing federal courts to find a "reasonable method" of accommodating prisoners, the lower court ignored this Court's principle of deference and the underlying bases for it.

In *Hewitt v. Helms,* 459 *U.S.* 460, 474 (1983), this Court explained why the federal courts must adopt a policy of deferring to the decision of prison administrators:

> As we said in *Rhodes v. Chapman,* 452 *U.S.* 337, 349 n.14 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long standing relations between prisoners and guards, prisoners *inter se,* and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat,* 452 *U.S.* 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

While the lower court's opinion initially acknowledges that federal courts must defer to the judgment of experienced prison officials, it then asserts that the duty of the federal courts is to find "a 'mutual accommodation' be-

tween the important institutional objective of security and the constitutionally protected rights of prisoners," 782 *F.*2d at 419 (7A) (Citation omitted). While federal judges must undoubtedly protect against unconstitutional restrictions of prisoner rights, the lower court's new standard requires judges to insert themselves into the role of prison administrator, to make determinations on how best to accommodate inmates' religious beliefs, and to make judgments regarding the security of the institution and rehabilitation of the inmates. The lower court's new standard outrightly rejects this Court's pronouncements that federal courts are not in a position to put aside the considered judgment of prison administrators, *Wolff v. McDonnell, supra,* 418 *U.S.* at 566, and that

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. [*Jones v. North Carolina prisoners' Union, supra,* 433 *U.S.* at 126 citing *Procunier v. Martinez, supra,* 416 *U.S.* at 405] (footnote omitted).

Ignoring the precedent set by this Court, the lower court's opinion requires judicial scrutiny of "discretionary actions that traditionally have been the business of prison administrators rather than the federal courts." *Meachum v. Fano,* 427 *U.S.* 215, 225 (1976).

Moreover, as pointed out by Judge Hunter in his dissent below, the lower court completely distorts the term "mutual accommodation" as it has been used by this Court. The Third Circuit's opinion requires federal judges to simply set aside the expertise of prison officials

regarding the security of their institutions and to second guess their judgment by determining how best to accommodate inmates. Yet, this Court has used the term "mutual accommodation" to express the idea that *first amendment rights must give way* in the prison setting when important penological objectives are at stake. In *Jones, supra,* 433 *U.S.* at 129-30 this Court stated:

> In seeking a 'mutual accommodation between the institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application,' *Wolff v. McDonnell,* 418 *U.S.* at 556, *this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. See, e.g., id.,* at 561-562; *Lanza v. New York,* 370 *U.S.* 139, 143 (1962). These restrictions have applied as well where First Amendment values were implicated. *See e.g., Pell v. Procunier, supra; Procunier v. Martinez,* 416 *U.S.* 396 (1974); *Meachum v. Fano,* 427 *U.S.* 215 (1976). (Emphasis added).

Two years later in *Wolfish, supra,* this Court explained that "mutual accommodation" between correctional objectives and the constitution requires that the rights of prisoners give way to "[t]he fact of confinement." 441 *U.S.* at 546. This Court explained that

> [p]rison officials must be free to take appropriate actions to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 129; *Pell v. Procunier, supra,* at 822, 826; *Procunier v. Martinez, supra,* at 412-414.

Id. at 547. Finally, the Court noted that considerations of internal order, security and discipline

> are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. [*Id.* at 548, citing *Pell v. Procunier, supra,* 417 *U.S.* at 827].

In adopting an erroneous approach of "mutual accommodation," the lower court rejected its own standard previously articulated in *St. Claire v. Cuyler, supra,* which was based upon this Court's analyses in *Wolfish, Jones,* and *Pell.* In *Jones,* state prison officials testified that the concept of a prisoners' labor union was potentially dangerous. The district court had noted that the opinions of the officials were "sincerely" held and arguably correct. 433 *U.S.* at 127. This Court held that the burden was *not* on the prison officials "to show affirmatively that the union would be detrimental to proper penological objectives' or would constitute a present danger to security and order." *Id.* at 128 citing district court's opinion 409 *F. Supp.* 937, 944-945. Since determinations regarding prison security "are peculiarly within the province and professional expertise of corrections officials" the court must defer to such expertise, unless there is substantial evidence indicating that the officials' response is exaggerated. *Id.* citing *Pell v. Procunier, supra,* at 827. Thus, the Third Circuit in its *St. Claire* opinion held that the State has the burden of producing evidence that the exercise of first amendment rights would create a potential danger to the security of the prison. 634 *F.*2d at 114. If the expert officials testify to opinions that are sincerely held and

arguably correct, the court must defer to such judgment unless the prisoners prove by substantial evidence that the official's response is exaggerated or their belief irrational. *Id.* at 115. In the present case however, the Third Circuit rejected this sound analysis and now places the burden upon the State officials to show not only that the regulations in question "were intended to serve, and do serve" the objective of institutional security but also that "no reasonable method exists by which (prisoners') religious rights can be accommodated without creating bonafide security problems." 782 *F.*2d at 420, (9A) (footnote omitted). By shifting the burden of proof to the State and adopting what in essence boils down to a least restrictive alternative analysis, the new standard improperly requires federal judges to become "increasingly enmeshed in the minutiae of prison operations" in order to make determinations of what reasonable accommodations will be permitted to override security concerns. *Bell v. Wolfish, supra,* at 562. The lower court's new standard flies in the face of Supreme Court precedent which holds that "(t)he necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this." *Jones, supra,* at 128.

Moreover, as noted in Judge Hunter's dissent below, the new standard adopted by the Third Circuit is based upon an unfounded perception that the *St. Claire* standard did not provide adequate protection for the rights of prisoners to freely exercise their religious beliefs. 782 *F.*2d at 425 (21A-22A). Based upon this unsubstantiated "perception" the court below announced a standard which is in

direct conflict with the burdens of proof and policy of deference required by this Court's precedents. This Court has never imposed a least restrictive alternative standard to the issue of prisoners' first amendment rights[20] versus the security of a correctional institution. The Third Circuit's new standard leaves no room for "responsible prison officials . . . to take reasonable steps to forestall" threats to the security and internal order of a prison, and no room for them "to act before the time when they can compile a dossier on the eve of a riot." *Jones*, 433 *U.S.* at 132-33.

Because the Third Circuit's standard ties the hands of the state prison officials, requires federal judges to override the expertise of the officials regarding security measures needed to maintain internal order and completely ignores relevant precedent of this Court, petitioners ask that this Court reaffirm the policy of deference and impose the same burdens of proof as previously articulated in *Jones* and *Pell*.

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[20]There is language in *Procunier* which suggests that a regulation which infringes on first amendment rights must be no greater than necessary. 416 *U.S.* at 413. However, the Court there was analyzing the free speech rights of free citizens, *i.e.*, those who corresponded with inmates. 416 *U.S.* at 408-409.

CONCLUSION

For all the foregoing reasons, petitioners Edward O'Lone, James Ucci and William Fauver, pray this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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DATED: April 16, 1986

APPENDIX

Ahmad Uthman SHABAZZ and Sadr-Ud-Din Mateen

v.

Edward O'LONE, Individually and in his official capacity as Administrator of Leesburg Prison Complex and James A. Ucci, Individually and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex and William Fauver, Individually and in his official capacity as Commissioner of the New Jersey Department of Corrections.

Appeal of Ahmad Uthman SHABAZZ
and Sadr-Ud-Din Mateen.

No. 84-5772.

United States Court of Appeals,
Third Circuit.

Argued June 21, 1985.

Argued in Banc Nov. 12, 1985.

Decided Jan. 27, 1986.

James Katz (argued). Tomar, Parks, Seliger, Simonoff & Adourian, Haddonfield, N.J., for appellants.

Irwin I. Kimmelman, Atty. Gen. of New Jersey, James J. Ciancia, Asst. Atty. Gen. (Laurie M. Hodian (argued) Deputy Atty. Gen., of counsel), for appellees.

Before ADAMS, Acting Chief Judge, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, CLOVITER, BECKER, STAPLETON and MANSMANN, Circuit Judges.

OPINION OF THE COURT

ADAMS, Acting Chief Judge.

Appellants, two state prison inmates, brought this suit under the federal civil rights act challenging certain prison regulations as violative of their first amendment rights. Specifically, they allege that the regulations, which prevent them from attending weekly religious services, infringe their right freely to exercise their chosen faith. The district court, 595 F.Supp. 928 (1984), after a hearing, found no constitutional violation. It therefore denied appellants' request for injunctive relief and dismissed their claims for damages. The prisoners' appeal was originally heard before a panel of this Court, which decided it under the standard set forth in *St. Claire v Cuyler*, 634 F.2d 109 (3d Cir.1980). That standard has governed inmates' challenges to prison regulations on religious grounds in this Court since *St. Claire* was decided. However, there has been an increasing concern that the *St. Claire* test provides inadequate protection for the rights of prisoners freely to exercise their religion. Because of this concern, rehearing in banc was granted for the purpose of reconsidering the *St. Claire* standard. We now conclude that *St. Claire* should be modified. The judgment for defendants will therefore be vacated and the matter remanded to the district court to be reconsidered in light of the standard articulated in this opinion.

I.

Ahmad Uthman Shabazz and Sadr-Ud-Din Mateen, the appellants here, are inmates at the New Jersey State Prison at Leesburg, and are members of the Islamic faith.

Leesburg is a medium security prison and work institution, which houses prisoners and trains them to engage in various programs to produce goods and provide services for the state.

Prisoners at Leesburg are assigned to one of three custody classifications: maximum security, gang minimum, or full minimum. These classifications determine the jobs and work locations to which the prisoners are assigned. Maximum security prisoners are given tasks that are performed within the main building. Gang minimum inmates work at job sites outside the gates of the main building but must remain under the supervision of a corrections officer at all times. Prisoners within the full minimum classification also work outside the main building, but under minimal supervision, and are housed at a minimum security facility known as the Farm. Both Shabazz and Mateen were classified gang minimum when this suit was filed; in May 1984, Mateen was reclassified as a full minimum prisoner and transferred to the Farm.

At issue here is the right of minimum-security Muslim prisoners to attend Jumu'ah, the weekly religious service of the Muslim faith, when there is no evidence that their attendance in the past posed any threat to security. Jumu'ah is held at noon every Friday, as it must take place after the sun reaches its apex and before the Asr, or mid-afternoon prayer. It is the only Muslim congregational service of the week, is commanded by the Qur'an, and cannot be performed at any other time. Concededly, it is a central practice of the Muslim faith.

Jumu'ah services have been held at the prison since 1979. Prior to the implementation of the regulations chal-

lenged here, all prisoners of the Muslim faith were permitted to attend Jumu'ah if they wished. Those gang minimum prisoners who were ordinarily assigned to work details outside the main building were assigned to alternative jobs within the main building on Fridays if they expressed a desire to attend Jumu'ah. Full minimum security inmates housed at the Farm were permitted to return by themselves to the main facility in order to attend the services.

In March 1984, however, two changes in correctional policy, one enacted at the state level and one by the officials at Leesburg effectively eliminated the opportunity for most Muslim prisonrs classified in the two lower security classes to attend Jumu'ah. In April 1983, the New Jersey Department of Corrections issued Standard 853, which required that gang minimum inmates ordinarily be assigned to jobs outside the main building. This resulted in the elimination of the alternative work details on Fridays for Muslim gang minimum prisoners. The prison officials explained Standard 853 as necessary to alleviate the critical overcrowding at Leesburg by reducing the number of inmates working in the main facility during the day.

A second change in prison policy was effected in March 1984, when Leesburg officials issued a memorandum announcing a flat ban on returns to the main facility by prisoners assigned to outside work details. This rule was said to be intended to reduce security and discipline problems by diminishing the burden on prison guards of accounting for and supervising inmates.

The combined effect of the two new regulations was that Muslim gang minimum prisoners could no longer remain inside the main building on Fridays in order to attend Jumu'ah, nor could they return from their outside work assignments to take part in the services. The ban on returns likewise barred most full minimum prisoners from attending Jumu'ah, although those full minimum inmates working near the Farm are permitted to return to that facility to attend a service there. Thus, since April 1983, only those prisoners considered the greatest security risks have been assured of participation in the Muslim services at Leesburg.

Shabazz and Mateen, both lesser security inmates, are precluded from attending Jumu'ah by the prison regulations. They filed this lawsuit against Leesburg prison officials under 42 U.S.C. § 1983 (1982), contending that the regulations infringe their right, guaranteed by the first amendment, freely to exercise their religion. It has been stipulated by all parties that the appellants' religious beliefs are sincere.

Appellants' claim was evaluated by the district court under the standard articulated in *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir.1980). Under the *St. Claire* test, the state must "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." *Id.* at 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." *Id.* (quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 127, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629 (1976)). Once the state has satisfied its burden under the *St. Claire* analysis, the court must defer to

the prison officials' judgment unless the inmate shows "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable." *Id.* at 115 (quoting *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974)).

The district judge concluded that the state had met its burden under *St. Claire* by producing testimony from prison officials that the challenged regulations reduced the strain of overcrowding at Leesburg and eliminated security problems caused by prisoner returns during the workday. The officials' opinions were sincere, the court found, and arguably correct. Because appellants failed to show that the policy changes constituted an exaggerated response to security concerns, the district court entered judgment for the defendants. The prisoners filed this timely appeal.

II.

Claims by inmates that prison regulations violates their constitutional rights raise difficult problems. Imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens. *See Jones*, 433 U.S. at 125, 97 S.Ct. at 2537; *Pell*, 417 U.S. at 822, 94 S.Ct. at 2804. It is also true that important state interests are at stake in the prison context, such as the maintenance of institutional security, and the preservation of internal order and discipline. *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979); *Pell*, 417 U.S. at 822-23, 94 S.Ct. at 2804. The Supreme Court has stressed repeatedly the importance of judicial recognition of the expertise of prison administrators, and

the need for deference to experienced prison officials' judgment. *Bell*, 441 U.S. at 547, 99 S.Ct. as 1878; *Jones*, 433 U.S. at 126, 97 S.Ct. at 2538; *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1973).

The Supreme Court has also emphasized, however, that inmates retain those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system. *Jones*, 433 U.S. at 125, 97 S.Ct. at 2537; *Pell*, 417 U.S. at 822, 94 S.Ct. at 2804. While "a healthy sense of realism" may require that federal courts acknowledge their relative incompetence in the area of prison administration, *Procunier*, 416 U.S. at 405, 94 S.Ct. at 1807, it is also understood that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06, 94 S.Ct. at 1807-08; *see also Cruz v. Beto*, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (per curiam); *Johnson v. Avery*, 393 U.S. 483, 486, 89 S.Ct. 747, 749, 21 L.Ed.2d 718 (1969). As stated by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974), there must be a "mutual accommodation" between the important institutional objective of security and the constitutionally protected rights of prisoners. *See also Bell*, 441 U.S. at 546, 99 S.Ct. at 1877.

However, the standard articulated in *St. Claire* does not call for such an accommodation. Rather, under *St. Claire*, a mere declaration by prison officials that certain religious practices raise potential security concerns is sufficient to override a prisoner's first amendment right to

attend the central religious service of his faith. The prison officials are not required to produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe the inmates' free exercise rights. Nor do they carry a burden of showing that bona fide security problems occurred or are likely to arise because of the religious practice at issue.

The flaw in the *St. Claire* standard is well illustrated by the facts presented in this case. The prison officials here do not claim that attendance at Jumu'ah is an inherently dangerous practice. Indeed, they could not, as attendance was permitted for all Muslim prisoners until the March 1984 implementation of the new regulations and there is no suggestion that such attendance resulted in any harm. Rather, defendants merely assert that security problems caused by overcrowding and understaffing necessitated the policy changes that outlawed attendance at Jumu'ah for nearly all but the maximum security prisoners. Although appellants suggested alternative methods of allocating work assignments that would both satisfy defendants' security concerns and honor the prisoners' wish to participate in Jumu'ah services, the prison administrators rejected these suggested solutions. They assert that any such accommodations would raise new security problems.[1] Yet, under *St. Claire*, the state was under no

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1. The prison officials claim that the assignment of Muslim minimum security prisoners to alternative work details on Fridays would lead to the formation of affinity groups, or work groups consisting entirely of Muslim prisoners. According to the state, affinity groups can raise problems in maintaining order and discipline. We do not decide here the weight to be given to evidence concerning affinity groups in this case. However, such evidence may be presented to the district court on remand, for consideration under the standard set forth in this opinion.

burden to establish that such security concerns were genuine and were based upon more than speculation.

We do not here resolve the validity of defendants' contention that accommodation of the prisoners' religious rights cannot be accomplished without damage to institutional security.[2] Nor do we reach the ultimate question whether the prison regulations challenged here impermissibly impinge upon the plaintiffs' religious rights. We conclude only that the *St. Claire* standard, which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provides inadequate protection for their free exercise rights and therefore must be modified. Accordingly, we hold that, upon remand, the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems.[3] The expert

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2. We do not understand defendants to be arguing that any of the other legitimate penological interests identified in *Pell* —the deterrence of crime, the rehabilitation of criminals, and the segregation of prisoners from the public—would be threatened by permitting plaintiffs to attend Jumu'ah services. *See Pell*, 417 U.S. at 822-23, 94 S.Ct. at 2804. Indeed, nothing in the record in any way suggests that precluding prisoners from attending Jumu'ah services furthers any of these goals. What is more, it is difficult to imagine how allowing prisoners to participate in religious services could inhibit deterrence, rehabilitation, or segregation. If anything, it would seem that attendance at religious services might play a role in facilitating inmates' rehabilitation and their eventual successful return to society.

3. Factors such as the endemic crowding in a state's prisons, the cost of implementing various methods of accommodating

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testimony of prison officials should be given due weight, but such testimony is not dispositive of the issue whether no reasonable adjustment is possible. Thus, in resolving a motion for summary judgment in a case challenging prison regulations as violative of the free exercise clause, the district court must take into account all materials tendered in opposition thereto that raise genuine issues of material fact. Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights.[4]

The dissent complains that the test articulated here fails to give adequate weight to the principle of deference stated by the Supreme Court in its cases addressing prisoners' constitutional rights. We disagree. Federal courts must afford deference to decisions by prison officials in areas concerning security, but where first amendment values are implicated such deference must be tempered by an effort to accommodate free exercise values.

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prisoners' religious rights, understaffing, and inmates' demonstrated proclivity to unruly conduct may be considered in determining whether a potential method of accommodation is reasonable.

4. *Dreibelbis v. Marks*, 742 F.2d 792 (3d Cir. 1984), and *Cole v. Flick*, 758 F.2d 124 (3d Cir.), *cert. denied* — U.S. —, 106 S.Ct. 253, 88 L.Ed.2d 260 (1985), must now be read in light of this modification of *St. Claire*.

Further, none of the Supreme Court cases cited by the dissent as requiring deference to the arguably correct opinions of prison officials involved a practice that lies at the core of an explicit constitutional guarantee, such as the right to attend religious services central to the prisoners' faith. Cases concerning rights of association or privacy provide uncertain guidance in resolving the clash of interests presented here. Thus, while we are not unaware of the role that the deference principle has played in the Supreme Court's opinions regarding prisoners' rights and indeed subscribe to that principle, we seek only to ensure that it does not deprive prisoners' free exercise rights of all content.

III.

We recognize that the record in this case reveals particularly strong interests both on the part of the prisoners and on the part of the prison administrators. The regulations challenged here prohibit inmates whose religious beliefs are conceded to be sincere from attending the only weekly service of their faith. Furthermore, there is no indication that participation in Jumu'ah services by lesser security prisoners, which was allowed until March 1984, caused security problems. However, the security problems identified by the state cannot be disregarded and are worthy of serious consideration. We are mindful of the difficulties inherent in the effort to effect an accommodation that is both sensitive to the sincere religious practices and beliefs of the prisoners and based upon an appreciation of the security problems faced by prison administrators. Nonetheless, such an effort is required under *Wolff v. McDonnell* and *Pell v. Wolfish*, and federal courts are

not free to abdicate their responsibility to see that a proper accommodation is achieved.

The district court should be given the opportunity to appraise the factors in this case in the light of the test we have adopted here. Therefore, the judgment of the district court will be vacated and the matter remanded for reconsideration under the standard set forth in this opinion.

JAMES HUNTER, III, Circuit Judge, with whom GARTH, Circuit Judge, joins, dissenting:

I cannot accept the majority's treatment of the institutional considerations prompting Leesburg's policies. These policies do not reflect an arbitrary restriction on the Jumu'ah service itself, but are founded in the very real problems of arranging for the service in a prison environment. Moreover, I have strong reservations about the role of "mutual accommodation" in the new legal standard governing prisoners' first amendment free exercise claims. The standard announced today is neither necessitated by the facts of the case before us nor supported by Supreme Court precedent. I must dissent.

I.

Before March 1984, all prisoners at Leesburg could attend Jumu'ah, a Muslim service held Fridays after the sun reaches its apex and before the midafternoon prayer. Gang minimum security prisoners ordinarily assigned to work details outside the main building who wished to attend Jumu'ah services would be assigned to an alternate work detail within the main building. Full minimum inmates assigned to the Farm were also free to return from the field unescorted for Jumu'ah services.[1]

In April 1983, the New Jersey Department of Corrections had promulgated Standard 853. This standard provided, *inter alia*, that all gang minimum work details should be assigned to jobs outside the main building. Its purpose was to alleviate the strain on prison facilities by

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1. Leesburg presently assigns inmates to one of three custody classifications which affect where the inmate works. Maximum security inmates are assigned to tasks within the main building. Gang minimum inmates are assigned to jobs outside the main building's gates on Leesburg's grounds but are constantly under the supervision of a corrections attendant. Full minimum security inmates, unlike maximum and gang minimum inmates, are housed outside the main building in the Farm, a minimum security building, and work outside the main building, often off Leesburg's grounds, with minimal supervision.

Leesburg State Prison is not a "holding tank" but a specialized correctional facility that teaches the incarcerated the skills required to function in free society. Leesburg accomplishes this goal by structuring the inmates' prison experiences through stages of increasing responsibility. The typical Leesburg inmate arrives as a maximum security prisoner, confined to the main building. The inmate may progress to gang minimum status, where he is able to work outside the main building's walls in groups of eight to ten under constant supervision of a corrections official. In the final stage, full minimum, the inmate is allowed to work outside Leesburg's grounds with little or no supervision. *See* App. at 52; Standard 853, "Eligibility Criteria For Reduced Security Custody Consideration," App. at 270-71.

This progression provides Leesburg's inmates with a structured series of goals, and posits release in free society as the ultimate goal. By removing the inmates at each successive stage further away from the confines of the main building and from direct supervision, this structure attempts to illustrate the benefits of responsibility and to ease the inmates' transition into society. Essentially, the program is a socialization technique for those with demonstrated anti-social proclivities. *See* App. at 54, 159-60.

reducing the demand for supervision during that part of the day when gang minimum inmates are working outside details. The standard also attempted to reduce the tension between inmates and staff and among the inmates themselves, tensions associated with overcrowded prison conditions. In March 1984, Leesburg implemented this standard by changing the alternative inside gang minimum work detail to a maximum security detail.

On March 7, 1984, Leesburg announced a flat ban on returns to the main facility and to the Farm by prisoners assigned to outside work details. The district court found, and the record reflects, that this was done to reduce the burden on the supervising guards of accounting for inmates in transit and to reduce search procedures, overcrowding, and the attendant security risks presented by the already large volume of traffic at the main building's gate. In combination with Standard 853, the ban on returns effectively ended the opportunity for most gang minimum and full minimum inmates to attend Jumu'ah on a regular basis.

II.

A.

Although the free exercise clause of the first amendment protects religious activity from governmental interference, this protection, like other constitutional guarantees, is adjusted when it conflicts with the legitimate goals and policies of correctional institutions. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060,

92 L.Ed. 1356 (1948). The fact of conviction and internment necessarily implies that inmates' rights and privileges are not coextensive with those of the free citizens. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

In *Pell*, the Supreme Court identified four basic goals of the correctional system: the deterrence of crime; the rehabilitation of criminals; the protection of the public; and the maintenance of institutional security. 417 U.S. at 822-23, 94 S.Ct. at 2804. The *Pell* court identified this last goal as the central goal of incarceration, essential to successful attainment of all other corrective goals. *Id.* at 823, 94 S.Ct. at 2804. The Court also observed that policies involving rehabilitation and institutional security "are particularly within the province and professional expertise of corrections officials," *id.* at 827, 94 S.Ct. at 2806, and admonished courts to defer to prison officials' decisions in these areas unless the evidence indicates that officials had greatly exaggerated their response to prison conditions. *Id.*

Although the majority opinion recognizes and reiterates the deference principle, the standard announced today displays a lack of appreciation for the considerations supporting this principle. In part, deference is dictated by the very fact that our prisons are "places of involuntary confinement of persons who have demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). Deference also stems from the inherent nature of the judicial branch as separate from

those branches that administer our prisons, and lacking in the expertise to run correctional facilities. *See Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). Running a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974), and the considered pace by which we decide cases exposes us to the temptation to simplify the institutional context of prison policies. In *Hewitt v. Helms*, 459 U.S. 460, 474, 103 S.Ct. 864, 873, 74 L.Ed.2d 675 (1983), the Supreme Court explained the relationship between the deference principle and the circumstances under which prison administrators must operate:

> As we said in *Rhodes v. Chapman*, 452 U.S. 337, 349 n. 14, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long-standing relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 [, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158] (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

B.

After acknowledging that federal courts are limited in their ability to review prison administrators' decisions, the majority then asserts that the ultimate goal of judicial review in free exercise cases "must be a 'mutual accommodation' between the important institutional objective of security and the constitutionally protected rights of prisoners." Maj.Op., at 419. While I agree that federal courts must police the unlawful abridgement of constitutional rights, we, by necessity, must support a higher level of restrictions on constitutional guarantees in a prison setting. However, under the majority's mutual accommodation standard, federal courts are no longer guardians of fundamental constitutional rights but arbitrators in disputes between prison officials and inmates. To facilitate this dubious new calling, the majority asks federal judges to second guess the administrators' judgment by finding "a reasonable method" to accommodate inmates. Contrary to the applicable precedent, the majority today opens the door to judicial review of those "discretionary actions that traditionally have been the business of prison administrators rather than the federal courts." *Meachum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976).

The new standard's lineage is uncertain at best. The term "mutual accommodation" first appears in *Wolff v. McDonnell*, a case involving alleged violations of inmates' due process rights. *Wolff*, 418 U.S. at 556, 94 S.Ct. at 2974.

Subsequent Supreme Court decisions caution against construing this language as a license to the federal courts to determine the exact balance of constitutional rights and institutional interests. Indeed, only three years later, the Court admonished against extracting the term from its context and reading into it a broader meaning than it had in *Wolff:*

> In seeking a 'mutual accommodation between the institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application.' *Wolff v. McDonnell*, 418 U.S. at 556 [94 S.Ct. at 2975], this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. *See, e.g., id.*, at 561-562 [94 S.Ct. at 2977-78]; *Lanza v. New York*, 370 U.S. 139, 143 [82 S.Ct. 1218, 1220-21, 8 L.Ed.2d 384] (1962). *These restrictions have applied as well where First Amendment values were implicated. See, e.g., Pell v. Procunier, supra; Procunier v. Martinez*, 416 U.S. 396 [94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Meachum v. Fano*, 427 U.S. 215 [96 S.Ct. 2532, 49 L.Ed.2d 451] (1976).

Jones, 433 U.S. at 129-30, 97 S.Ct. at 2539-40 (emphasis added).

The Court's direction to resist the temptation to invest "mutual accommodation" with a meaning foreign to its application is underscored by the Court's 1979 decision in *Bell v. Wolfish*. In *Bell*, the "mutual accommodation" language appears in a paragraph that explains the policy considerations behind the deference principle. In context, the Court uses the term to convey the message that rights retained by an inmate must yield to "[t]he fact of confinement as well as to the legitimate goals and policies of the penal institution." 441 U.S. at 546, 99 S.Ct. at

1877. The *Bell* Court then proceeded to explain the policies supporting judicial deference to the decisions of prison administrators:

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier, supra*, [417 U.S.], at 823 [94 S.Ct. at 2804]; *see Jones v. North Carolina Prisoner' Labor Union, supra* [433 U.S.] at 129 [97 S.Ct. at 2540]; *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S.Ct. 1800, 1810, 40 L.Ed.2d 224 (1974). Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra* [433 U.S.], at 129 [97 S.Ct. at 2540]; *Pell v. Procunier, supra* [417 U.S.], at 822, 826 [94 S.Ct. at 2804, 2806]; *Procunier v. Martinez, supra* [416 U.S.], at 412-414, 94 S.Ct. at 1810-1812].

Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a correction facility are not susceptible of easy actions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies aid practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra* [433 U.S.], at 128 [97 S.Ct. at 2539]; *Procunier*

v. Martinez, supra [416 U.S.], at 404-405 [94 S.Ct. at 1807-1808]; *Cruz v. Beto, supra* [405 U.S.], at 321 [92 S.Ct. at 1081]; *see Meachum v. Fano*, 427 U.S., at 228-229 [96 S.Ct. at 2540-2541], "Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell v. Procunier*, 417 U.S. at 827 [94 S.Ct. at 2806].a We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judi-

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a. What the Court said in *Procunier v. Martinez* bears repeating here:

> "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of these reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

Ibid. [footnote by the *Bell* Court].

> cial. *Procunier v. Martinez, supra* [416 U.S.], at 405 [94 S.Ct. at 1807]; *cf. Meachum v. Fano, supra* [427 U.S.] at 229 [96 S.Ct. at 2540].

441 U.S. 546-48, 99 S.Ct. at 1878-1879. This language in no way supports the proposition that courts must endeavor to discern the precise mix between prison objectives and religious activity.

Nor does the context in which the term appears in *Wolff* warrant the majority's new standard. The paragraph, in its entirety, reads:

> Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. *Cf. CSC v. Letter Carriers*, 413 U.S. 548 [, 93 S.Ct. 2880, 37 L.Ed. 2d 796] (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 [, 93 S.Ct. 2908, 37 L.Ed.2d 830] (1973); *Parker v. Levy*, 417 U.S. 733 [, 94 S.Ct. 2547, 41 L.Ed.2d 439] (1974). Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. *Cf. Morrissey v. Brewer*, 408 U.S. [471] at 488 [92 S.Ct. 2593 at 2603]. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

418 U.S. at 556, 94 S.Ct. at 2975.

There is an important clue in the majority opinion, however, that reveals the authority on which the majority rests its investiture of the term "mutual accommodation" with a new meaning. The majority states that "there has been an increasing concern that the *St. Claire* test [*St.*

Claire v. Cuyler, 634 F.2d 109 (3rd Cir.1980)] provides inadequate protection for the rights of prisoners freely to exercise their religion." Maj.Op., at 417. This concern is founded upon a perception, unsupported by reference to empirical data or legal authority, of *St. Claire's* inadequacy. Proceeding from that unsubstantiated "concern," the majority then announces a new standard which not only shifts the burden of proof to the state but also replaces the Supreme Court's established doctrine of deference with what amounts to a "least restrictive alternative" analysis. This new standard opens the door to a floodgate of future litigation to determine what "reasonable" accommodation must be permitted to override security or other penological objectives.

In contrast to *St. Claire,* which implemented *Jones* and which only allocated to the state the burden of going forward with evidence that to permit the exercise of the prisoner's first amendment rights would create a potential danger to institutional security, the majority would now place the burden on the state to prove that no reasonable means exist by which the prisoner's religious rights can be accommodated without impairing security. Again, in contrast to *St. Claire,* which placed the burden on the prisoners to prove, by substantial evidence, that the prison officials had exaggerated their response to security problems, or that the officials' beliefs were unreasonable, the majority does no more than require that the prisoners be given the opportunity to show that a reasonable method of accommodating a "central religious practice" exists that does not endanger security. Maj.Op., typescript at 420. Thus, the majority has now departed from the bur-

dens of proof and standards of deference prescribed by Supreme Court authority, and has done so on no more substantial basis than an unsupported and undefined perception that the *St. Claire* standard provided inadequate protection for the rights of prisoners to exercise their religion.

I do not share this perception, and consequently I cannot agree that it is necessary to create a new test *ex nihilo* to address it, particularly since the test proposed requires us to ignore Supreme Court instruction and precedent. That precedent provides the proper framework for analysis in the context of the present case.

C.

The mutual accommodation doctrine is unfaithful to precedent in another way. Of the four penological goals identified by the *Pell* Court, the majority opinion asserts that only one, prison security, can be considered by the district courts dowsing for the ultimate goal. The court's failure to mention the other interests involved is particularly curious in the instant case. The record clearly shows that Leesburg adopted the policy changes to serve both rehabilitative and security goals, and the district court relied on both goals in dismissing the action.[2]

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2. I have difficulty comprehending the majority's professed inability to understand Leesburg officials "to be arguing that any of the other legitimate penological interests," *i.e.*, rehabilitation, are adversely affected by permitting returns. Maj.Op., at 420 n. 2. Subdivision "C" under the first argument in the State's brief to this court states, in pertinent part, that "[b]oth

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District courts will be forced to speculate as to whether the majority believes that administrators may limit free exercise rights only when security interests are at stake, or whether it tacitly found the rehabilitative justifications proffered below untenable. Although it is true that the maintenance of institutional security and order is the crux of the other goals, I know of no authority that restricts our review to security concerns.

III.

The majority opinion minimizes the problems Leesburg confronts in allowing inmates to return from outside work for Jumu'ah by asserting that prison officials cannot claim that Jumu'ah raises an unacceptable risk to prison security. Maj.Op., at 419. It is true that Leesburg has not yet experienced problems with the service itself. The real problem, however, comes not from the service but from the allocation of resources required to hold the service and to regulate the passag of people for that purpose. Moreover, the logistical problems with Jumu'ah compromise the state's efforts to ease the inmates' transition

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security and rehabilitative objectives" are impaired by returns. *See also id.* at 427-429. In any event, the majority's assumption that religious services, whenever they may be held, necessarily facilitate rehabilitation rests upon no firmer ground than its perception of *St. Claire's* inadequacy. The record before us contains testimony by Leesburg's officials that returns promote confrontational and nonassimilative behavior among the inmates. *See* App. at 88, 161, 183-85; *see also* App. at 299 (district court's findings of fact). The testimony was not contradicted by appellants. The deference principle, as well as the customarily accepted principles of civil procedure, dictate that we accept this evidence as true.

from prison to free society. Leesburg adopted its "no return" policy in response to its experiences with inmates who systematically avoided outside work details with a battery of fictitious excuses. *See* App. at 158-59. For example, only about half of those who requested to remain in the main building for Jumu'ah actually attended the service. *See* App. at 72, 181. Finally, Leesburg's deferential treatment of Muslims and the institutionalized identification and separation of Muslims *vis-a-vis* other inmates and staff raise serious rehabilitative and security concerns glossed over by the majority. In short, the institutional context in no way provides a particularly compelling case calling for federal court entanglement in prison operations.

A.

The record shows that State issued Standard 853, "Eligibility Criteria For Reduced Custody Consideration," to relieve prison tensions stemming from overcrowding and to provide a structured rehabilitative program.

Overcrowding is endemic in the New Jersey prison system. In 1981, Governor Byrne issued an executive order declaring a state of emergency in New Jersey's state and local correctional facilities. This order empowers New Jersey's Commissioner of the Department of Corrections to transfer inmates from local to state prisons. *See* App. at 282-291. The effect of this state of emergency has been to strain Leesburg's facilities to the limit. The Farm, originally designed to house 175 full minimum inmates, now houses about 500. The main building, constructed to accommodate 500 inmates, must now support 700. *See* App. at 157-58. Leesburg's Administrator Ed-

ward O'Lone's testimony highlights the wide range of security problems presented by the overcrowding:

> THE COURT: And when was that [the institution of gang minimum outside work details], about April of '83?
>
> THE WITNESS: Yes, your honor, when the standards changed. That was done greatly because Leesburg was designed for 504 inmates and housed as many, as I think it was quoted, 754 at one time. It has been my intention and continues to be my intention to keep as many inmates out of that compound during the day as possible. It alleviates all kinds of social pressures. Obviously, if I have a hundred inmates or 150 inmates out in the woods, that takes the pressure off the gymnasium, it takes the pressure off of the mess hall, it takes the pressure off the medical service, it takes the pressure off—and also takes the pressure off of each other and makes them more, in a very overcrowded situation, makes it a more socially adaptable environment.

App. at 157.

Prior to Standard 853, Leesburg's prisoners advanced directly from maximum security status to full minimum security status. Those so promoted would be relocated from the main building to the Farm. Gross overcrowding at the Farm and problems associated with inmates' advancement from a constantly to a rarely supervised status, however, resulted in the creation of the "gang minimum" security classification as in intermediate stage. Although gang minimum inmates must be housed in the main building, Leesburg's rehabilitative program requires them to work on the institution's grounds to participate in the sequence of increased responsibility. Leesburg's Chief Deputy James Ucci explained the problem cogently:

> THE WITNESS: The standards have changed somewhat, where originally an inmate would go—the majority of inmates would go from maximum or medium to full minimum. Then the standards come out and said that inmates had to spend a certain period of time in gang minimum.
>
> THE COURT: How long?
>
> THE WITNESS: We at Leesburg go from minimum of 30 days. It could be up to 90 days depending on. you know, the inmate and the case. But let's say 30 days, our minimum. And when this happened. Everybody that was full minimum, of course, went to the Farm. Now, we have all these men that would have normally been full minimum immediately and go to our Farm, right, or to Ancora. Mainly to the Farm, though. Now, all of a sudden you got all these guys that are gang minimum, right? So, now you got to do something with them so they are gang minimum.
>
> THE COURT: Because they're now entitled to outside work details.
>
> THE WITNESS: By definition they're supposed to work outside to show a certain amount of trust that they can handle as trust.
>
> THE COURT: Not just entitled but supposed to be.
>
> THE WITNESS: Supposed to be. right. Not entitled. If I used the word "entitled," I mean supposed to. We're compelled to put them in a reduced working or living atmosphere, either one of the two.

App. at 54-55.

B.

Returning gang minimum inmates pose at least three distinct security risks to Leesburg, all of which relate to the problem of arranging for Jumu'ah in a productive, overcrowded and understaffed prison facility. The first

logistical problem concerns the distance of the outside work details from the main building. Many of the details work as far away as 45 minutes from the main building. *See* App. at 67, 82. Because gang minimum inmates must be constantly under the supervision of a corrections official, the return of one inmate requires the return of the entire detail to the main building's receiving gate, and consequently disrupts the work of the entire detail. *See* App. at 82-83. Second, the process of physically moving the inmate through the receiving gate poses a serious security risk. Because Leesburg is a productive facility, the truck traffic through the receiving gate during the day is heavy. Both trucks and inmates must enter Leesburg through the same gate, a situation that disrupts truck traffic and increases the possibility of escapes through the gate. Moreover, the timing of the return raises security problems because the services take place at about the same time as the noon meal. During this meal, most of the corrections officials are stationed as a security precaution around or in the dining hall. The increased risk of escapes during this mass movement of inmates requires Leesburg to keep its receiving gate shut. Consequently, those returning for Jumu'ah would be required to return well before the noon meal.[3]

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3. Chief Deputy Ucci's testimony best illuminates these problems:

> Q. Is the receiving gate area where the trucks go in and out? Is that the area that requires intensive supervision?
>
> A. Well, yes, it is. It has been used in the past as an escape route by inmates. Just as recently as the other day at

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> Trenton State Prison inmates hid in the food truck, three of them, and tried to escape. And I've been involved in my career in at least three escapes I know through receiving gates at Rahway State Prison. So it is an area of concern with myself and the administrator and the staff at the institution. It's one you got to be very alert at.
>
> Q. And the process for bringing inmates in, whether it's at the end of the workday or he would have to come in during the day, is that he comes to the receiving gate and what happens?
>
> A. He comes to the receiving gate, the officer, of course, would check. The officer brings them there, tells the officer that he's coming in at the receiving gate, and he'll authorize the tower officer to push the button to open the gate and he would walk through the gate, check him against his mug shot. Then, of course, they will, after they I.D. him, he will be stripped searched, center will be notified that he's coming in, and they will be brought into the institution.
>
> Q. And while the officers are handling that process, what happens to the truck traffic?
>
> A. The truck traffic has to be—of course has to be stopped while this is going on, you can't handle both traffics at the same time.
>
> . . . . .
>
> Q. Are there any other activities going on in the institution at that time [when inmates would return for Jumu'ah]?
>
> A. Yes, there is, mess is going on at that time; that's one of our major—at 12 noon mess is going on.
>
> Q. And what does mess involve?
>
> A. Noon meal.
>
> Q. How many inmates are fed at that time?
>
> A. It would affect the entire population, which would be over seven hundred inmates at that time.
>
> Q. Except for—
>
> A. Except the ones outside, of course.

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Q. Is that considered a mass movement of inmates?

A. Yes. Mess is—noon meal is considered a mass movement in an institution.

Q. Where is your staff at that time?

A. At the time of mess you try to deploy most of your correction officers in your mess hall. Whenever you have a mass movement in the institution or a mass gathering you try to have as much staff available in that area at that given time. So, majority of your officers are in mess, are very available if they're needed in case there is a problem.

Q. Is the receiving gate open at that time?

A. No, the receiving gate is closed. The officers at the receiving gate are eating approximately at that time themselves, and then they help out with other things.

Q. You said that just before the noon mess there is an inmate count?

A. There is a count at 11:30, yes.

Q. And what does that entail?

A. Well, that is a security count, so everyone in the institution has to be—every inmate at Leesburg State Prison, including Ancora, is accounted for and that means that the center keeper takes the count and every inmate that is not needed on an essential detail inside the institution or outside is locked in his cell or goes back to his dormatory unit and he's counted by the officer in that unit. Anyone that has an inmate in another area will submit a count slip to the center keeper and then the center keeper will, of course, correlate the slips and will make sure that every inmate is accounted for.

Q. And that takes approximately how long each day?

A. It could take anywheres from 15 to 25 minutes.

Q. And that begins at 11:30?

A. Approximately, now, 11:30. It could be a couple minutes after 11:30.

Q. Can inmates come in during the count process, come in from the outside?

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With regard to full minimum inmates returning from outside work, Leesburg experiences some of the same logistical problems at the Farm. The time lost in transit,

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A. During the security count there is, if possible, no movement at all. No, the gate wouldn't be open.

. . . . .

Q. Can inmates come in while the noon mess movement is occurring?

A. Under normal circumstances, no. But, of course, if we had to bring somebody in because of an emergency, yes. But under normal circumstances we don't like to open a receiving gate during mass movements.

Q. Why is that?

A. Well, the greater chance of escape again.

Q. And what was the basis for you issuing that [no return] policy or that memo?

THE COURT: Now here's the meat and potatoes question. You answer that one. I was going to ask that one myself. Why the change?

THE WITNESS: The change was made because of the fact that there was just too much traffic going through that gate, it was disrupting too many other—too many other movements through the receiving gate. It was just—we just couldn't handle all that traffic. It either meant backing trucks up four, five and six or it meant, you know, holding up the inmates.

THE COURT: You mean four, five and six trucks back up?

THE WITNESS: Yes, Sir. I been out there when it was pretty jammed up and it either would mean you can't do both, it means—it either means you hold up all your vehicle traffic or you hold up all your foot traffic. And it was just too much for that traffic gate. And we don't have officers to man the other [personnel] gate.

App. at 62-63, 79, 84, 86-87.

however, is greater because full minimum inmates often work off Leesburg's grounds. *See* App. at 119-21.

These problems shed light on the associated concerns that permitting returns would cause for Leesburg's correctional goals. Returns effectively waste the whole productive day, not just for the practicing Muslim, but for the entire work detail that must accompany the practitioner back to the gate. Some of the rehabilitative benefits of the structuring process[4] would be lost, and allowing even one inmate an excuse to avoid work affects the supervisor-inmate relationship for the rest. *See* App. at 83, 161, 178.

Permitting returns by full minimum inmates is impractical for an additional reason. Many full minimum inmates participate in a work release program under the supervision of civilian employers. Administrator O'Lone noted that those employers might elect not to participate in the program if inmates were allowed to work four day weeks. Thus, permitting returns from civilian employment would bar Muslim inmates from work experience most closely approximating life in free society. *See* App. at 183.

C.

The majority, however, is neither concerned with concrete logistical problems nor wasted efforts at rehabilitation, the institutional context of the two challenged policies. Instead, asserting that "there is no suggestion that [Jumu'ah] attendance [has] resulted in any harm," Maj.

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4. *See supra* note 1.

Op., at 419, the majority instructs the district court to devise an alternative work detail for Muslims. In a cryptic footnote, the majority indicates that the only conceivable defense Leesburg could raise would be evidence that alternative details would result in "affinity groups" deleterious to institutional security. *Id.* n. 1. These casual comments display a "concern" with abstraction as well as the avoidance of the hard practicality of the problem.[5]

A quick review of the record reveals concrete reasons for judicial deference. Leesburg implemented the gang minimum status less than a year before the no return policy, rendering evidence of problems with gang minimum attendance problematic. It is true that Leesburg initially attempted to accommodate gang minimum inmates who wished to attend Jumu'ah by creating an alternate work

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5. The majority allows, in general terms, that a state may meet its burden by producing evidence of factors such as overcrowding, understaffing, additional costs of accommodation, and inmate proclivity to violence. Maj Op., at 420, n. 3.

These factors are present here, adequately developed in the record, and identified in the district court's opinion, and uncontradicted by the prisoners. Thus, even applying the new standard, which I believe to be an incorrect standard, the majority should simply affirm the district court's judgment. Yet the majority refrains from applying its standard to the facts before it, merely instructing the district court to give Leesburg's officials' testimony "due weight." Maj.Op. at 420. By failing to affirm, the majority has sent a confusing signal to the district court, since the very factors which the majority now requires district courts to consider are apparently regarded by the majority of this court to be insufficient for purposes of an analysis under the majority's new standard.

detail. This attempt at "mutual accommodation" collapsed in light of a number of problems. On the rahabilitative front, Leesburg found that a number of inmates would use any excuse to avoid outside work details. As Leesburg gradually removed the inmates' opportunity to use these fictitious excuses, by, for example, scheduling sick call well before the details were scheduled to leave for outside work, the inmates would move to the next excuse, trying to find the point of least resistance. As it stood, nearly half of those who asked to return for Jumu'ah received reprimands for failing to attend. Thus, on the facts of this case, creating a special exception for Jumu'ah presents the nearly impossible task of separating the conscientious from the nonconscientious.

On the security front, this separation process itself is inherently confrontational and exacerbates the tensions between staff and inmates. Further, the creation of an inside detail for gang minimums requires an extra expenditure of scarce resources to maintain the separation of maximum and gang minimum security prisoners in the main building and to handle the increased strain on prison facilities caused by the alternative detail. An alternative detail also would create the perception among inmates of special treatment for Muslims which could foster divisive tensions between Muslim and non-Muslim inmates. This problem would be enhanced by the continued identification and association of Muslim inmates, the basis for the formation of prison gangs, euphemistically referred to as affinity groups.[6] *See generally* App. at 178-81.

IV.

Under the standard adopted by this Circuit in *St. Claire v. Cuyler*, 634 F.2d 103 (3d Cir.1980), the foregoing reasons would be more than enough to justify Leesburg's policies. *See supra* p. 420. Yet, because the *St. Claire* standard fails to place a burden on the state "to

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6. Administrator O'Lone explained:

> THE WITNESS: We have found out and think almost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest that what you wind up with is a leadership role and an organizational structure that will almost invariably challenge the institutional authority. If you have a group that recognizes a specific leader, whether it be religious, social, psychological, whatever, once the leader is offended, the leader says, "we're not working." Or we're not doing something." And then you've got a confrontation.
>
> THE COURT: This has been a concrete institutional experience, has it?
>
> THE WITNESS: Yes, it has, your honor, not only in my institution, it's been a concrete institutional experience everywhere. That's one of the reasons that in prisons inmates are not permitted to wear insignia; that the bikers can't not wear their insignia and nobody wears colors because we can't have a thing where they can identify each other. "Don't punch him, he's safe." It's one of the reasons that we keep affinity groups dispersed. We recognize their right to meet and to have affinity groups under controlled situations, but sometimes that can get out of control.

App. at 179-80.

establish that such security concerns were genuine and were based upon more than mere speculation." Maj.Op., at 420, the majority remands the case for another hearing.

The burden *St. Claire* places upon prison administrators is to testify to opinions that are " 'held "sincerely" and [are] arguably correct.' " 634 F.2d at 114 (citation omitted). This is the only burden permitted by the deference principle, a burden firmly rooted in precedent. This standard represents the reasoned extension of the Supreme Court's analysis in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). In *Jones*, prisoners filed suit alleging that their first amendment free speech and associational rights were unlawfully abridged by a policy that restricted the prisoners' efforts at soliciting membership in a prison union and barred union meetings. The three-judge district court enjoined the regulations, concluding that "[t]here is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions." 433 U.S. at 124, 97 S.Ct. at 2537.

The Supreme Court reversed, holding that it was error for the court to place the burden on prison administrators "to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order.' " *Id.* at 128, 97 S.Ct. at 2539. Indeed, the administrators had to show only that their regulation was reasonable. *Id.* at 129, 97 S.Ct. at 2539. The *Jones* Court then placed the burden upon the prisoners to show that the administrators were "conclusively wrong in [the] view" that Union activity would harm the prisons' internal security and order. *Id.* at 132, 97 S.Ct. at 2541.

The majority maintains that *Jones* and other Supreme Court cases involving inmates' rights are inapplicable to cases involving the first amendment's free exercise guarantee. Maj.Op., at 420. I disagree. The Court has shown no inclination to draw arbitrary distinctions among constitutional guarantees for the purposes of analyzing inmates' rights, nor has the majority provided a tenable basis for us to do so today. Instead, the Supreme Court has used essentially the same analytic framework whether the claimed right has been based upon the first amendment's free speech and association guarantees, the fourth amendment's guarantee of privacy, or the fifth and fourteenth amendments' due process guarantees. *See, e.g., Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (fourteenth amendment's due process clause); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (first amendment free speech rights, fourth amendment privacy rights, fifth amendment's due process clause); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (first amendment free speech and associational rights); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (first amendment free speech rights). These cases are still good law and clearly control this appeal. However, because the Supreme Court has yet to address specifically the scope of review over prison regulations limiting religious activity, the majority believes it is free to adopt a standard that is inconsistent with the precedent controlling analogous cases. I cannot disagree more

strongly; free exercise does not require its own, nondeferential standard of review.

V.

The new and nondeferential standard now imposed by the majority upon prison officials will not only cause substantial problems in the already difficult field of prison administration, but it will necessarily result in an impairment of security in those institutions where security is the primary consideration. Because I cannot subscribe to such a result, I would affirm the district court's dismissal of the suit, and I therefore dissent.

Ahmad Uthman SHABAZZ and
Sadr-Ud-Din Mateen, Plaintiffs,

v.

Edward O'LONE, Individually, and in his official capacity as Administrator of Leesburg Prison Complex; James A. Ucci, Individually, and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex; and William Fauver, Individually, and in his official capacity as Commissioner of the New Jersey Department of Corrections, Defendants.

Civ. A. No. 84-1789.

United States District Court,
D. New Jersey.

Oct. 15, 1984.

OPINION

GERRY, District Judge.

This case was brought under 42 U.S.C. § 1983. The plaintiffs, two inmates at the New Jersey State Prison at Leesburg, sought a preliminary injunction restraining the defendants, various correctional officials at Leesburg, from interfering with their attendance at the Jumu'ah, a Muslim congregational service occurring every Friday shortly after the noon hour. Pursuant to Rule 65(a)(2), the parties have agreed to consolidate the preliminary and permanent injunction applications. A hearing was held on June 20 and June 21, 1984. The following constitutes the court's Rule 52(a) findings of fact and conclusions of law regarding the propriety of the issuance of the injunction.

FINDINGS OF FACT

1. Plaintiff Shabazz is a prisoner at Leesburg who has been a practicing Muslim since 1973. His security status within the institution is "gang minimum."[1] Plaintiff Mateen is also a prisoner at Leesburg, a practicing Muslim since 1977, and a "full minimum" inmate. There is no question as to the sincerity of the religious beliefs of either plaintiff. The defendants in this case are: William Fauver, New Jersey Commissioner of Corrections; Edward O'Lone, Leesburg Superintendent; and James Ucci, Chief Deputy at Leesburg.

2. Leesburg is a medium security state prison located on approximately 1100 acres of land. On this site, there is a main prison building which houses inmates assigned to maximum and gang minimum custody status. A second building, the Farm, houses only those inmates having full minimum status.[2]

In April 1983, the New Jersey Department of Corrections promulgated Standard 853, which sets out three prisoner custody levels, the privileges and responsibilities attached to each, and the criteria for assignment to each. Those prisoners considered the greatest security risk have "maximum" custody status. Such inmates "shall be assigned to activities within the confines of the security

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1. A discussion of the several security levels to which an inmate may be assigned will be found *infra*.

2. There is a third unit, Ancora, which is geographically separate from the 1100 acre compound. Neither of the plaintiffs is housed at Ancora, and thus, no further discussion of this unit is warranted.

of the institution under continuous supervision." In the case of Leesburg, this means that such inmates must remain within the main building. There is an intermediate classification, "gang minimum." Inmates classified as gang minimum, according to Standard 853, "shall be assigned to activities or jobs which routinely require them to move outside the security of the institution, on institutional grounds, and within eyesight of a correction officer . . . or other employee authorized to supervise them." Successful completion of a period at gang minimum is a prerequisite to the attainment of "full minimum" status, the lowest security level. Inmates classified as full minimum, in the words of the Standard, "must be assigned to either (1) work details, jobs, or programs outside the main institution, on or off institutional grounds, with minimal supervision, or (2) a satellite unit or minimum security trailer unit (such as the Farm building), or (3) both (1) and (2)." Prior to April 1983, inmates had been eligible to proceed directly from maximum to full minimum status. Apparently, however, this somewhat radical reduction in supervision had been problematic, prompting the change reflected in the Standard. Also, apparently, prior to April 1983 certain inmates classified as gang minimum held jobs *within* the confines of their institutions (e.g., within the "main building"). The language of Standard 853, however, seems to mandate that gang minimum inmates routinely work *outside* the institutional buildings where they are housed, on institutional *grounds*. It seems that the new "outside" policy reflected in the standard was at least in part a response to a critical overcrowding in the state's prisons, and that the policy was at least in part designed to ease tension

and drain on the facilities during that part of the day when the inmates were outside the confines of the main buildings.

According to the defendants, the new policy of increased outside assignments was not easily implemented. Although the number of inmates assigned to outside details gradually rose after April 1983, some inmates, for a variety of reasons, were able to avoid actually reporting for their assignments. Moreover, some inmates who went out on their work details, found reasons—legitimate or otherwise—for returning to the main building during the course of the work day. In the months following April 1983, the defendants instituted a few changes whereby those assigned to outside details would remain outside for the entire work day. For example, arrangements were made for lunch to be brought out to inmates rather than have them return to the institution for lunch; similarly, medications were brought out to the inmates, and appointments with doctors or social workers were scheduled for the late afternoon or early evening (following the end of the work day). These changes culminated in a memo dated March 7, 1984 and directed to the Leesburg inmate population. The memo reads as follows:

> Due to the increase of the size of outside details at both Medium [the main building] and Minimum [the Farm], once an inmate goes to work in the morning, he will remain on his detail throughout the day. He will no longer be brought back into the institution on a normal work day unless it is an emergency. In the event of an emergency, your detail officer will contact his immediate supervisor, who will see to it that you are brought in.

Thus this flat ban—except for emergencies—on returns to the facilities during the day has the effect of preventing practicing Muslims who work outside from participating in the Friday Jumu'ah service.

3. The Jumu'ah service is a congregational service with a minister, or imam, presiding. It is the only congregational service of the week, and it therefore is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects. The service occurs on Fridays and must take place after the sun reaches its apex and before the next scheduled Muslim prayer, the Asr, a prayer performed individually in the mid-afternoon. Thus, Jumu'ah may only be said during a limited number of hours. In addition, unlike other Muslim prayers which are performed individually and can be made up if missed, the Jumu'ah is obligatory, cannot be made up, and must be performed in congregation. The Jumu'ah is therefore regarded as the central service of the Muslim religion, and the obligation to attend is commanded by the Qur'an, the central book of the Muslim religion.

4. Plaintiff Mateen testified that to his knowledge, Jumu'ah services, up until the March 1984 memo, had been conducted on a regular basis at Leesburg for at least the previous five years. Prior to March 1984, those Muslim prisoners classified as gang minimum who were housed at the main facility, assigned to outside work details, and who wished to attend the Jumu'ah were permitted to remain in the prison and work on an alternate detail within the main building on Fridays so that they could attend the service. Muslim prisoners housed on the Farm and assigned to outside work reported on Fridays

to their regular work assignment but were permitted to return by themselves to the Farm to worship. Those inmates who remain inside the buildings may still attend Jumu'ah. In March 1984, the defendants changed the alternate work detail from a gang minimum detail to a maximum detail, thus eliminating the opportunity for gang minimum inmates assigned to outside details to remain inside on Fridays and attend the Jumu'ah.

At the time the complaint in this case was filed (and to this day), plaintiff Shabazz was a gang minimum inmate. Prior to March 1984, he had a job inside the main building and attended Jumu'ah. Since March 1984, Shabazz has worked outside and has been unable to attend the Jumu'ah. At the time the complaint was filed, plaintiff Mateen was also a gang minimum inmate. Prior to March 1984, he was assigned outside and worked the alternate detail on Fridays. After March 1984, he remained outside and was therefore unable to attend the Jumu'ah. However, on May 31, 1984, Mateen was reassigned to minimum status and transferred to the Farm. He was assigned to work in the kitchen, an inside job, so that presently he is able to attend the Jumu'ah. Although there was testimony from the defendants that job assignments are fairly constant, the court is not convinced that Mateen will not, at some time in the near future, be reassigned to an outside detail and consequently be deprived of the opportunity to participate in the Friday service. (Accordingly, we will reject the defendants' mootness argument as to Mateen.)

5. At issue in this case are two regulations—Standard 853 and the March 7, 1984 memo-applicable to *all* Leesburg inmates, which, in combination, have the effect of

denying plaintiffs the opportunity to attend the Jumu'ah.[3] In their testimony, defendants Ucci and O'Lone advanced several justifications for the two regulations. Standard 853 was explained as a response to prison overcrowding. The mandate that gang minimum prisoners work outside their institutions was described as a means to alleviate the tension produced by the presence of many men at close quarters, as well as a means to reduce the strain on institutional resources. Moreover, the mandatory transitional gang minimum level was seen as a means for reducing the "shock" caused by the sudden reduction in supervision.

The March 7, 1984 memo, it was stated, served a couple of purposes. The first objective had to do with "traffic control." The evidence establishes that, surrounding the main building at Leesburg, there is a gate through which all inmates entering the building must pass. At the time of entry, inmates must be strip-searched and otherwise processed. This same gate is the receiving area for all visitors to the institution, including the trucks making the frequent deliveries of supplies to the facility. It was felt by defendants that there was too much congestion at this gate, that too many guards were required to handle all the traffic, and that deliveries were unduly delayed.[4] Thus, the March 1984 directive effectively put an end to this congestion problem at the main building. However,

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3. Although Mateen is presently able to attend the service, for the discussion that follows, we will assume that his tenure at his kitchen job is impermanent, and that he may at any time be moved outside.

4. During the time when all gang minimum prisoners were returned to the building at the end of their work day, but only at this time, a separate gate was set up to receive them.

this goal does not account for the prohibition on full minimum prisoners returning to the Farm during the day, since these prisoners do *not* have to pass through the gate to enter the Farm unit. A second goal was advanced in support of the March 1984 policy. This goal was framed in terms of rehabilitation. It was stated that, in order for prisoners to be ready to undertake careers in the free society, they would have to learn to work a full, productive day without taking time off from their jobs to pursue personal matters. Thus, the new policy was designed to eliminate interruptions in the work day, interruptions which had been reduced by prior means (*See* No. 2, *supra*), but not totally eliminated. The policy took some pressure off guards supervising outside details, who, previously, had had to evaluate each reason possibly justifying a return to the facilities and either accept or reject that reason. Moreover, because gang minimum inmates must always be at least within eyesight of a guard, if permission were granted for any one inmate on a detail to return inside, *all* inmates on the detail would have to be marched inside. Thus, the rehabilitative lesson threatened to be lost on more than just the affected inmate.

Superintendent O'Lone further stressed that Leesburg's work program is not simply a "make-work" project. Goods produced at Leesburg and services provided by its inmates have positive, sometimes vital, effects throughout the state.

6. The March 7, 1984 memo addressed to the inmate population indicates that the new policy is a response to the "increase of the size of the outside details." The plaintiffs introduced documentary evidence which seems to

indicate that in the months immediately proceding the issuance of the memo, the number of people on outside details either remained about the same or decreased slightly. In doing so, the plaintiffs sought to establish that the new policy, not grounded in the facts on which it purported to be based, was pretextual; that is, that its true purpose was not to deal with increased volume but to deprive inmates of the opportunity for worship. However, the court does not believe the plaintiffs have proven their case on this issue. First, the memo does not give a time frame during which the size of details increased; certainly between April 1983 and March 1984, the size of the details increased. Second, the statistics introduced, according to the defendants, only refer to gang minimum details. Statistics were not kept for the number of full minimum inmates on outside details. The defendants credibly testified that the total number of men on outside details increased in the months preceding March, 1984. Moreover, the defendants testified that the statistics refer to the number of men *assigned* to outside details, not the number of men who actually reported for work. This latter number, it was stated, increased as the prison successively took steps to eliminate grounds for not reporting. Finally, the defendants testified that it was not their policy to always inform inmates of the reasons behind their actions. Thus, the memo was not drafted to reflect all the reasons—given above—for the institution of the new policy.

7. The plaintiffs also sought to establish that, notwithstanding the institution-wide nature of the March 1984 policy individualized adjustments could be made to accommodate the religious practices of the plaintiffs with little inconvenience to the defendants, or disruption of

the goals established by defendants. As to gang minimum inmates, such as the plaintiff Shabazz, it was proposed that they be permitted to return to the alternate detail on Fridays, as this adjustment would neither add to congestion at the main gate nor result in loss of work time. The defendants stated that the alternate detail had been converted to a detail for maximum inmates, and that the prison did not mix gang minimum and maximum inmates on details. Thus, the detail was no longer available for this purpose. The defendants did not explain why inmates of different security levels are not mixed on work assignments when otherwise they are mixed. However, the elimination of this alternate detail as a possible assignment for gang minimum inmates is in accordance with Standard 853's mandate to move gang minimum inmates outside. Therefore, the charge proposed by plaintiffs, although not a threat to the goals reflected in the March 7 policy, does interfere with the goals reflected in Standard 853.

As a second alternative, the plaintiffs proposed that, as to gang minimum inmates such as Shabazz, they be assigned to *other* gang minimum work details whose assignments require them to remain *inside* the main building. The defendants admitted that there are such details in the kitchen, bakery and tailor shop. They stated, however, that these details are reserved for the "riskiest" gang minimum candidates, those for whom it was felt an outside job might be problematic. Thus, it was felt that it would be ill advised to move these risky inmates outside to accommodate Muslims such as Shabazz. Moreover, such a course is arguably *contra* to Standard 853's mandate

of moving outside those inmates capable of handling the additional responsibility.

As a third alternative, it was proposed that gang minimum inmates such as Shabazz be assigned to details that work Saturdays or Sundays, thereby permitting these inmates to make up any time lost by not working Fridays. The defendants admitted that there are a limited number of inmates assigned to Saturday or Sunday work. They stated, however, that this proposal was impracticable. Since prison personnel are needed for other programs on weekends, the creation of additional weekend details would be a drain on scarce human resoources.

Regarding minimum security, Muslim inmates living at the Farm, such as plaintiff Mateen, it was proposed that they simply be assigned to jobs permitting them to work either in the Farm building or in its immediate vicinity.[5] This proposal would interfere with neither Standard 853—which contemplates that full minimum inmates may be assigned work *inside* satellite units such as the Farm—nor with the March 1984 policies, as the proposal would neither result in congestion nor a loss of worker productivity. The defendants justified their rejection of this proposal on a couple of grounds (which also have some applicability to the proposals advanced by plaintiffs regarding gang minimum detail assignments). First, it was stated that the defendants did not want to concentrate all Muslims who desired to attend the Jumu'ah in one or two details, and thereby create a cohesive, organized group

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5. Presently, inmates who work in the immediate vicinity of the Farm are permitted to attend the Jumu'ah, just as if they actually worked inside.

capable of challenging the institution. The evidence indicates that there are a substantial number of Muslims at Leesburg so that, if all requested reassignment, they would possibly form all Muslim details. The institution, it was stated, has difficulty with affinity groups of this nature. which threaten prison discipline, order and security. Second, the defendants stated that any of the plaintiffs' suggestions would raise the problem of favoritism: non-Muslim inmates would resent the special considerations given Muslims; would themselves request individualized treatment—thus destroying the "bright line" rules enunciated in the two policies in question; and might themselves (abusively) seek to fit within the Muslim exception. As a practical matter, the defendants stated that there is insufficient staff at Leesburg to allow for too much individualized treatment of inmates.

CONCLUSIONS OF LAW

1. The free exercise clause of the First Amendment generally prohibits government officials from interfering with the religious practices of ***non-prisoners*** absent a compelling justification, effectuated by a regulation interfering with the religious practice in the least restrictive manner possible.

This principle is not fully applicable to prisoners, however. Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement. But those constitutional rights are limited by the legitimate goals and policies of the penal institution. *See St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir.1980), *citing Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60

L.Ed.2d 447 (1979). The Supreme Court, in *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), named as legitimate goals of the corrections system: deterrence of crime, rehabilitation of criminals, and the central goal of maintaining security and order within the correctional facilities. The Court stated that considerations of rehabilitation and security "are peculiarly within the province and professional expertise of corrections officials," and that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Two succeeding Supreme Court cases also speak of the "wide-ranging" deference to be accorded prison officials in the adoption and execution of policies that are in their judgment necessary to further legitimate institutional goals. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Bell v. Wolfish, supra.*

The Third Circuit in the *St. Claire* case, *supra*, adding a further gloss to these Supreme Coourt opinions, has explicitly stated that these opinions "leave no room for a requirement that prison officials choose the least restrictive regulation consistent with prison discipline," as such a requirement is inconsistent with a deferential review. *Id.* at 114. Further, officials do not have the burden of affirmatively showing that a restriction would in fact be detrimental to proper penological objectives; all officials must do is show a *potential* danger to security, and may submit this evidence in the form of the opinions of re-

sponsible officials "held sincerely and arguably correct."[6] In order to overcome the presumption of validity accorded to prison regulations, the prisoner must prove that the officials' response to security considerations is exaggerated.

In rejecting, within the prison context, the "least restrictive alternative" approach to governmental infringements on First Amendment rights in favor of a deferential review, the *St. Claire* court implicitly stated, this court believes, that a prison regulation may be overbroad yet still valid. That is, an institution-wide policy may cast too wide a net, and catch within it some individuals for whom the same goals could be achieved with less trampling upon their rights. So long as such a policy, drafted to cover all inmates, effectively serves a valid goal, it is permissible, although it may have a particularly negative impact on some inmates. The rejection of a "least restrictive alternative" approach means that regulations need not be drafted so as to give individual consideration to the peculiar circumstances of each particular class of inmates.

2. Standard 853 and the March 7 policy were explained as institution-wide means designed to advance the goals of both security and order, and rehabilitation. Based on the testimony of the defendants, the court concludes that the means selected plausibly advance these

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6. The *St. Claire* court did not decide whether the showing of a *potential* threat to *non-security* goals (e.g., rehabilitation) would be sufficient grounds for restricting First Amendment practices. This is an issue this court need not decide, since the defendants' justifications for the restrictions are at least substantially tied to security concerns.

goals. Thus, the court believes it is virtually constrained to hold that, even as applied to plaintiffs, the two policies are valid.

Still, the Supreme Court cases do also speak of the need for a "*mutual* accommodation" between institutional objectives and constitutional rights. *See, e.g., Bell, supra,* 441 U.S. at 546, 99 S.Ct. at 1878, *cited in St. Claire, supra,* at 112. Therefore, some effort must be made to afford prisoners reasonable opportunities for the exercise of religious freedom. *See Barrett v. Commonwealth of Virginia,* 689 F.2d 498, 501 (4th Cir.1982). Although officials need not adopt the *least* restrictive approach consistent with its goals, neither would it seem they may adopt the *most* restrictive approach when faced with a claim of constitutional right. In effect, the application of the two policies to the plaintiffs is the most restrictive alternative. Therefore, the court believes it is necessary to consider the validity of the defendants' objections to the individualized alternatives posed by plaintiffs. (These objections are included in the court's findings of fact, *supra.*)

We must conclude that proposals having the effect of potentially concentrating all Muslim inmates in one or two inside details could be properly rejected as potential dangers to prison order and security. *See Jones, supra* (comparable facts). In drawing this conclusion, as well as the ones which follow, we defer to the expertise of the defendants. Proposals having the effect of displacing more dangerous inmates from inside jobs could be properly rejected on the same grounds. Proposals for weekend work as a substitute for Friday labor could properly be rejected as potential dangers to security insofar as such proposals would necessitate the diversion of manpower

from other programs requiring supervision. Proposals to allow inmates working on the 1100-acre grounds to return (escorted or unescorted) to their buildings for the Jumu'ah could properly be rejected on both security (particularly in the case of gang minimum inmates) and rehabilitation grounds. Finally, *all* proposals, insofar as they might be perceived by other inmates as evidence of favored treatment, could properly be rejected on the grounds of both security and rehabilitation. Thus, it appears that no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective. Therefore, the court cannot conclude that the defendants are in violation of plaintiff's First Amendment rights.

3. Plaintiffs' equal protection challenge must also fail. The "least restrictive alternative" approach applicable to equal protection cases involving fundamental rights, such as religious expression, must undergo the same modification it undergoes in the First Amendment context. Therefore, that Jews and Christians are able to attend their Sabbath services while Muslims may not is not in violation of the equal protection clause, as the practices of Christians and Jews in no way impinge upon the institution's objectives.

It is true that as a general matter, inmates of any religion may not be denied the reasonable opportunity to pursue their faith comparable to the opportunity afforded prisoners of other faiths. *Cruz v. Beto,* 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). But this does not mean that religious opportunities need be idential. *Id.* at 322 n. 2, 92 S.Ct. at 1081 n. 2. Here, the evidence indicates that generally Muslims have opportunities similar to those of

everyone else. There is, for example, an imam who regularly visits Leesburg, conducts a service on Wednesday nights, and is paid by the state. Furthermore, Leesburg makes special arrangements to accommodate the dietary needs of Muslims during Ramadan, a month-long holy season, suggesting that Muslims are not ignored in the observance of important religious events.

4. Finally, the plaintiffs have not proved that the policies under discussion, totally valid, were adopted with the impermissible goal of restricting their religious rights.

In view of the foregoing, plaintiffs' claims for compensatory and punitive damages must also be dismissed.

The foregoing represents the court's findings of fact and conclusions of law.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-5772

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN

Appellants

v.

EDWARD O'LONE, etc, et al.

(C. A. NO. 84-1789)

Present: ADAMS, *Acting Chief Judge,* SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON MANSMANN, *Circuit Judges*

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court list the above case for rehearing before the Court in banc at the convenience of the Court.

BY THE COURT,

/s/ Arlin M. Adams
Acting Chief Judge

DATED: August 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-5772

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN

v.

EDWARD O'LONE, Individually and in his official capacity as Administrator of Leesburg Prison Complex and JAMES A. UCCI, Individually and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex and WILLIAM FAUVER, Individually and in his official capacity as Commissioner of the New Jersey Department of Corrections,

Ahmad Uthman Shabazz and
Sadr-Ud-Din Mateen,

Appellants

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 84-1789)

Present: ADAMS, *Acting Chief Judge,* SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 21, 1985 and reargued before the Court in banc November 12, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court entered October 16, 1984, be, and the same is hereby vacated and the cause remanded to the said District Court for reconsideration under the standard set forth in the opinion of this Court.

ATTEST:

/s/ Sally Mvros
Clerk

January 27, 1986

STATE OF NEW JERSEY

DEPARTMENT OF CORRECTIONS
STANDARD 853. *ELIGIBILITY CRITERIA FOR REDUCED CUSTODY CONSIDERATION*

Revised
4/11/83

APPLICABLE TO: All Inmates with Prison Sentences regardless of Housing

Male Inmates with Indeterminate Sentences Housed in the Prison Complex

Purpose

The criteria set forth in these Standards shall be a means through which Classification Committees shall identify three groups of inmates:

(1) those who are eligible to be *considered* for full minimum custody status, *preceded by the successful completion of a period of time in gang minimum or in-and-out status.*

(2) those who are eligible to be *considered* only for gang minimum or in-and-out status.

(3) those who are not eligible to be *considered* for any type of reduced custody status.

The criteria shall be a framework within which Classification Committees shall exercise their discretion and their decision making responsibilities.

Privilege Versus Right

A reduction in custody status is a privilege and not a right.

Description of Custody Levels

A. *Maximum Custody*

Inmates classified as maximum custody shall be assigned to activities within the confines of the

security of the institution under continuous supervision.

B. *Gang Minimum or In-and-Out*

Inmates classified as gang minimum or in-and-out shall be assigned to activities or jobs which routinely require them to move outside the security of the institution, on institutional grounds, and within eyesight of a correction officer, civilian instructor, or other employee authorized to supervise them.

Unless otherwise specified, (see .4A), the successful completion of a period of time in gang minimum or in-and-out shall be a *prerequisite for full minimum custody status. The amount of time shall be at the discretion of the Institutional Classification Committee.*

Exception: Inasmuch as the Youth Correctional Institution at Annandale is classified as a minimum security institution, inmates at that facility are not required to fulfill the prerequisite time in gang minimum or in-and-out.

C. *Full Minimum*

Inmates classified as full minimum must be assigned to either: (1) work details, jobs, or programs outside the main institution, on or off institutional grounds, with minimal supervision, or (2) a satellite unit or minimum security trailer unit, or (3) both (1) and (2).

Full minimum custody status shall be a prerequisite for participation in all community release programs.

.4 *The Role of the Classification Committees and Factors Considered*

Except as otherwise noted, Classification Committees are the only bodies authorized to reduce or increase an inmate's custody status.

* * *